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IN THE

Supreme Court of the United States

October Term, 1953

No. [redacted]17

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS.

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PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS.

Questions Presented.

1. Whether petitioners are precluded and estopped from claiming that the terms of the theatre lease and film franchise, both granted by respondent Paramount, under which petitioner Partmar operated a first run motion picture theatre owned by respondent Paramount, were part of or resulted from a conspiracy in violation of the Antitrust Laws, petitioners having successfully asserted in defense of respondents' action to recover possession of said theatre and for declaratory relief that said lease and franchise were not a part of nor the result of any such conspiracy.

2. Whether a finding made in this action by the District Court that the theatre lease and film franchise under which petitioners operated said first-run motion

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picture theatre neither "constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conpiracy of any kind whatsoever between Paramount or any other person or persons," which said finding was made part of a decision and judgment denying restitution of said theatre to respondent Paramount, and declaring said lease and franchise "valid, subsisting agreement(s) in full force and effect," is *res judicata* against petitioners in their Counterclaims seeking damages for the alleged imposition of the requirements of said franchise and lease upon Partmar as a part of an alleged conspiracy in restraint of trade.

3. Whether petitioner's Counterclaims were properly dismissed after notice and upon a hearing settling findings, conclusions and judgment embodying such dismissal, there being, by virtue of said preclusion and estoppel and said *res judicata*, no genuine issue as to any connection between the conspiracy alleged and the terms of said franchise and lease, a fact material to recovery upon the Counterclaims.

4. Whether the dismissal of said Counterclaims could in any event affect the substantial rights of petitioners (28 U. S. C. A., Sec. 2111), in view of their inability to prove said material fact by reason of said preclusion and estoppel and said *res judicata*.

Petitioners have attempted to raise other questions. As hereinafter demonstrated, these questions have no proper place in the review of the judgments below in view of the limited appeal taken by petitioner and the limited review allowed by the Court in its order granting certiorari. Moreover, none of these contentions of petitioners are valid.

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Statement.

The "Statement" of petitioners (Pet. Br. 2-14) does not fully and correctly state the facts. Accordingly, the following full statement of the facts is submitted by respondents.

The Court of Appeals for the 9th Circuit affirmed the judgment of the District Court which dismissed petitioners' First, Second and Fourth Counterclaims. These Counterclaims sought damages from respondents on the ground that alleged excessive terms of a lease and franchise under which petitioners operated the theatre owned by respondent Paramount[1] and licensed the first run exhibition of films of said respondent were imposed pursuant to and were part of a conspiracy in restraint of trade between respondents and the other motion picture producers, distributors and exhibitors who were parties defendant in *United States v. Paramount Pictures, Inc.*

The main action to which petitioners interposed these Counterclaims was an action brought by respondent Paramount for unlawful detainer to evict petitioners from the theatre and to declare whether the lease and franchise were valid and subsisting agreements. In defense of these claims, petitioners urged *successfully* that the lease and franchise were valid and subsisting agreements *because* they constituted no part of and were not entered into as a result of any agreement, combination or conspiracy of

---

[1]Respondents Paramount Pictures Theatres Corporation and Paramount Pictures, Inc. are referred to herein as "respondent Paramount." The District Court did so throughout its findings, conclusions and judgment, pursuant to its conclusion No. 5 [Tr. 106] that they should be considered as one party. Petitioners likewise assert that though these respondents "were different corporations, there was no actual distinction between them" (Pet. Br. 23, fn. 1).

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any kind between respondent Paramount and any other person or persons.

The judgment of the District Court that petitioners were entitled to continue in occupancy of the theatre and that the lease and franchise were valid and subsisting contracts *was not appealed* from by either party and has become *final* as to all parties.

1. Basis of District Court's Dismissal of Counterclaims.

The basis of the District Court's dismissal of the Counterclaims and of the Court of Appeals' affirmance thereof is that on principles of preclusion and estoppel or *res judicata* petitioners are precluded from proving in support of their Counterclaims the exact opposite of what they have successfully contended in defense of respondent's claims. The only issue in the review of these determinations is the correctness of the application of these principles to the established facts, and the propriety of the summary disposition made of petitioners' claims in respect of which there remained no genuine issue as to this material fact.

2. The Complaint in This Action.

The complaint in respondent's action to recover possession of the theatre and for declaratory relief contains five causes of action:

(i) The First and Second Causes of Action seek restitution of possession of the theatre leased by respondent Paramount to petitioner Partmar.

(ii) The Third Cause of Action seeks to recover the balance due on a note payable by petitioner Partmar upon termination of the lease.

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(iii) The Fourth Cause of Action seeks to enforce a guarantee of performance of the obligations of the lease by petitioner Fanchon & Marco, Inc., which owns all the stock of Partmar.

(iv) The Fifth Cause of Action, for declaratory relief, sets forth a controversy between the parties as to whether the lease had been lawfully terminated by reason of termination of the franchise and asks for adjudication of the status of the contractual relationships of the parties. [Tr. 3-26.]

3. The Theatre Lease and Film Franchise.

The Court found that the theatre, which was the subject of the lease, was owned by respondent Paramount at the time the lease was executed, and, prior to said leasing, the theatre had been owned and operated by respondent for the sole purpose of having an outlet in the City of Los Angeles for the first-run exhibition of motion pictures produced by respondent. [Tr. 101.] Respondent Paramount was then engaged in producing, distributing and exhibiting motion pictures. [Tr. 3-11, 101.]

Respondent, concurrently with leasing the theatre, granted a franchise for the exhibition of its first-run pictures to petitioner Partmar, an independent exhibitor unaffiliated with any distributor of motion pictures. [Tr. 96, 101.] The franchise granted petitioner Partmar the first-run exhibition rights to all the product of respondent Paramount in the Los Angeles Area. [Tr. 104, 247.] It likewise gave Partmar clearance over all subsequent exhibitions of said pictures in the Los Angeles area. [Tr. 103, 270.] This contractual relationship commenced in 1933 and by a series of similar contracts, amendments and extensions was so continued that the terminal date

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of the lease and franchise in effect at the time the action was brought was March, 1952. [Tr. 37.]

The mutual advantages of this transaction are apparent. The theatre continued to be available to respondent Paramount as an outlet for its product. The franchise gave petitioners an assured source of first-run pictures to be exhibited in this theatre, with clearance over all subsequent run theatres in the Los Angeles area. Petitioner had no first-run theatre in the Los Angeles area, and the lease and franchise gave petitioners an opportunity to operate this first-run theatre with such assured source of film. It is obvious, therefore, that, as found by the Trial Court, the making of the lease and franchise could have nothing to do with any conspiracy to discriminate against independents found in the New York case of *United States v. Paramount,* since the lease and franchise are inconsistent with any such conspiracy.

To insure the use of the theatre as an outlet for respondent's pictures, it was provided that the franchise was terminable upon termination of the lease, and vice versa. [Tr. 211-212, 289.] The basis of the First and Second Causes of Action was the termination of the franchise and the consequent termination of the lease. [Tr. 17-18.] The controversy between the parties set forth in the Fifth Cause of Action was as to whether the lease had been terminated by reason of the termination of the franchise and the right and duties of the parties under the lease and franchise. [Tr. 24.]

4. The Counterclaims.

Petitioners answered the complaint and filed the Counterclaims, the dismissal of which is the subject of the review in this proceeding. It is only the First, Second

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and Fourth Counterclaims which are involved, since these were the only Counterclaims which were dismissed. [Tr. 110.]

These Counterclaims alleged the existence of a conspiracy which, it was alleged, was the subject of the judgment of the New York court in *United States v. Paramount Pictures, Inc.* It was alleged that the counter-defendants (respondents), pursuant to said conspiracy, imposed excessive terms in both the film franchise and theatre lease. [Tr. 36-42, Pet. 25.] No alleged facts supporting recovery on any other basis were set forth.

5. The Order of Trial.

By its order dated April 26, 1948, the District Court ordered separate trial of the First, Second and Fifth Causes of Action to be followed by a subsequent trial of other elements of the case, including petitioners' Counterclaims. [Tr. 44-45.] The trial which was conducted, commencing November 8, 1950, and ending December 21, 1950, was therefore a trial of the First, Second and Fifth Causes of Action of the complaint.

6. The Issues Actually Tried.

The issues actually tried at this trial were:

1. Did the injunction issued by the New York District Court in *United States of America v. Paramount Pictures, Inc.*, enjoin further performance of this franchise and thus terminate the franchise, bringing into effect the condition ending the term of the lease in the event of such termination or terminating the entire lease-franchise agreement as one inseverable contract?

2. Was the franchise agreement, *regardless of whether its performance was enjoined specifically by the decree*

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of United States of America v. Paramount Pictures, Inc., illegal and void and therefore terminated in law, bringing into effect the condition contained in the lease ending the term thereof in the event of the termination of the franchise, or rendering the lease likewise illegal and void as part of an inseverable contract?

It is with respect to the second of these two issues that the position was taken by petitioners which now precludes and estops them to prove an essential element of their Counterclaims. This issue was not, as urged by petitioners (Pet. 10), restricted to the question whether respondent Paramount had imposed unlawful restraints upon petitioners by the terms, conditions and charges of the franchise and lease. The franchise placed petitioner Partmar in a prior position with respect to run and clearance in the Los Angeles area and the Court considered whether this did not constitute an unlawful restraint upon *other exhibitors*. Before hearing the evidence in this respect the Court indicated there was considerable question in his mind in this regard, saying [Tr. 135]:

> "It seems to me, Mr. Hardy, that if there is a monopoly here Partmar has the monopoly. Partmar has the privileged position here in this community. They are the ones who have the theatres and they are the ones who show the pictures first. Not only that, but according to the theories advanced here, they are precluding the other theatres from showing those pictures until Partmar can show them first. So Partmar has the monopoly."

Evidence bearing upon this aspect of the issue presented was tendered to and received by the Court from witnesses of both parties. Most of this evidence is not

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included in the transcript of record herein. An example of such evidence, however, is in the transcript of record. [Tr. 135-136.] The Court there asked questions of a witness for respondent concerning the existence of any connection between any agreement with any other parties and the run and clearance provisions of the franchise, and was told there was none.

Petitioners' contention therefore (Pet. Br. 9, 18, 24, 25) that the issue of connection between the lease and franchise agreement and any conspiracy was not being considered by the Court is without foundation, as is demonstrated more fully, *infra,* Ch. II, A, p. 23, *et seq.*

This question raised by the Court as to the legality of the competitive advantages afforded to Partmar led petitioners to urge the Court, in its defense against respondent's claim of termination of the lease by virtue of its illegality, that the lease and franchise were legal because said agreements were not the product of agreement between any other persons than petitioners and respondent and were not part of or the result of any combination or conspiracy of any kind whatever. [Tr. 47, 52, 56-57, 58, 65.] Petitioners took this course because the legality of these competitive advantages and of other provisions of the franchise[2] and lease depended upon said agreements being independent of any conspiracy.

7. The Findings and Judgment of the District Court.

The District Court found in accordance with the contentions of petitioners. The result of the trial was a judgment for petitioners on the First and Second Cause

[2]The franchise covered all the product of respondent, Paramount Pictures, Inc. for 10 years [Tr. 247], and required Partmar to exhibit Paramount pictures a minimum of 46 weeks each year [Tr. 251].

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of Action [Tr. 109-111] and a declaration of rights and duties of the parties in accord with petitioners' contentions on the Fifth Cause of Action. [Tr. 110.]

Paragraph I of the Judgment decreed that respondent Paramount take nothing by the First and Second Causes of Action of the complaint, and consequently that petitioner Partmar remain in possession of the theatre. [Tr. 110.]

Paragraph II of the Judgment dismissed the First, Second and Fourth Counterclaims.

Paragraph III of the Judgment declared the rights and duties of the parties as follows:

(a) That the franchise between respondent Paramount and petitioner Partmar "is a valid subsisting agreement in full force and effect". [Tr. 110-111.]

(b) That the lease between respondent Paramount and petitioner Partmar "is a valid subsisting agreement in full force and effect". [Tr. 110-111.]

This judgment not only sustained the validity of the franchise and lease as effective to prevent respondents from repossessing the theatre. It further decreed the rights and duties of the parties as including continued performance of these agreements "in full force and effect." In order to hold that the franchise and lease were thus effective to prevent petitioners from obtaining restitution of the theatre and in order to hold that said agreements were "in full force and effect" the Court found it necessary to and did conclude that each of said agreements:

"is in all respects legal." [Tr. 106-107.]

In support of this conclusion the District Court found that neither of said agreements was entered into as a

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part of or as a result of any agreement, combination or conspiracy. In this respect the Court found [Tr. 103-104]:

> "20. Paramount, not in conjunction with any other major studio, entered into the franchise agreement which gave to Partmar the right to exhibit the first run features of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constitute any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, *nor between Partmar and any other person or persons.*"

The District Court made it clear, moreover, that it would not have adjudged petitioners entitled to continued possession of the theatre and to performance of the franchise were it not for this finding. [Tr. 142.]

8. The District Court Did Not Determine Merely That Lease and Franchise Were Legal "Standing Alone"; but Expressly Stated that There Was No Connection Between Them and Any Conspiracy.

As shown under Chapter III, 4, *infra,* p. 54 *et seq.*, the contention of petitioners, repeatedly made throughout their brief (Pet. Br. 11, 12, 15, 19, 24, 26, *et seq.*), that all the Trial Court determined was that the lease and franchise were "not, *standing alone,* violative of the antitrust laws," leaving open the question of whether they were a part of or result of any conspiracy, is totally unsound. The District Court tried the issue of whether the lease and franchise agreement were violative of the antitrust laws, and particularly as to whether they were connected with any conspiracy. The Trial Court made a

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specific finding that they were legal on all grounds and that there was no conspiracy connected with them. This repeated contention of petitioners that the Trial Court merely held the lease and franchise agreement valid "standing alone" and apart from any alleged conspiracy appears to be the keystone to their contentions on this appeal. But mere repetition of a false premise does not add validity thereto.

9. Finding 20 Required Dismissal of Counterclaims Since It Removed an Essential Base for Establishing These Counterclaims.

The District Court recognized of course that this finding precluded recovery upon petitioners' First, Second and Fourth Counterclaims. These Counterclaims were based solely on the contention that the conspiracy in *United States v. Paramount Pictures, Inc.* had been implemented by the lease and franchise and that the terms, conditions and charges contained in said lease and franchise were excessive and were imposed as a part of or as a result of the conspiracy. The District Court filed a Memorandum of Opinion. [Tr. 70-95.] In this Opinion [Tr. 94] and by an appropriate conclusion of law [Tr. 107, Conclusion 11], the District Court held that the above quoted Finding No. 20 (*supra*, p. 11) precluded petitioners from asserting or proving that there was any connection between the conspiracy alleged in the Counterclaims and the terms, conditions and charges embodied in the franchise and lease, and it would therefore be futile to take evidence with respect to such Counterclaims.

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10. Notice, Hearing and Argument Preceded Dismissal of Counterclaims.

Contrary to petitioners' assertions (Pet. Br. 18) that the dismissal of the Counterclaims occurred "without any request therefor from the counterclaim defendants, without any previous notice to or knowledge of petitioners, without any hearing of any kind granted to petitioners . . .," the fact is that prior to entering judgment dismissing the Counterclaims the Court submitted its Opinion stating the conclusion that such dismissal was appropriate. This Opinion directed petitioners to submit proposed findings of fact and conclusions of law. Those submitted by petitioners, however, did *not* embody the conclusion that the Counterclaims should be dismissed, and a set of proposed findings of fact and conclusions of law were submitted by respondents. The findings and conclusions proposed and submitted by respondents fully stated the conclusion that the Counterclaims could not proceed to trial [Tr. 107-108] and the findings of fact which supported this conclusion. Copies of these proposed findings were served upon petitioners and the matter of settling the findings, conclusions and judgment came on for hearing, on notice, before the District Court on June 18, 1951. Petitioners appeared through their counsel and particularly objected to the adoption of the proposed findings and conclusions which embodied the dismissal of the Counterclaims. This matter was argued by counsel for petitioners. [Tr. 143-147.] At the conclusion of and as a result of this hearing the Court adopted and accepted the proposed findings, conclusions and judgment submitted by respondents and made its order accordingly. Included in said judgment was Paragraph II which dismissed petitioners' First, Second and Fourth Counterclaims. [Tr. 110.]

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11. Petitioners Had a Choice Either to Appeal or to Accept Finding 20 That There Is No Connection Between the Alleged Conspiracy and the Lease and Franchise Agreement. They Chose to Accept the Judgment in Their Favor Based Thereon.

At this point petitioners were presented with a choice. They could have appealed from the entire judgment and thus set at large all the findings and conclusions upon which each part thereof depended, or they could have accepted all the consequences of these findings and conclusions.

The judgment declared, pursuant to the Fifth Cause of Action for declaratory relief, that the lease and franchise are valid, subsisting agreements in full force and effect. [Tr. 110-111.] This was not a mere conclusion of law in support of the judgment denying eviction. It was a separate part of the decree based upon the same findings and conclusions as the eviction judgment but applied to a different cause of action. It was favorable to petitioners in so far as it secured to them continued performance of the contracts. However, it was prejudicial to them inasmuch as it precluded recovery upon the Counterclaims.

Petitioners unquestionably had a right to appeal from the declaration that the lease and franchise were valid and subsisting agreements and Finding 20, upon which in part that declaration was based, to the effect that there was no connection between any conspiracy and the lease and franchise agreement. They could, on such appeal have urged that Finding 20 was not supported by the evidence, or was otherwise improper. Of course, had they succeeded in this attack, the inevitable result would have

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been the elimination from the judgment of the declaration that the lease and franchise agreement were valid, subsisting agreements in full force and effect. Neither of these agreements could possibly be valid and subsisting and in full force and effect if they were in fact entered into as a part of or as a result of a conspiracy to restrain or monopolize interstate trade.

As to the portion of the judgment denying restitution of the theatre to respondent Paramount, petitioners were equally able to attack Finding 20. Though the judgment was in this respect favorable to petitioners, Finding 20, upon which it was in part based, was clearly prejudicial because, while it stands, it precludes recovery upon their Counterclaims.

Electrical Fittings Corp v. Thomas & Betts Co. (1939), 307 U. S. 241, is a precise holding that petitioners in this case did have the right to seek elimination of Finding 20 in relation to the denial of restitution of possession of the theatre even if petitioners were correct in their contention that such finding was immaterial to such restitution.[3]

Of course, by thus setting at large the findings and conclusions with respect to the validity of the lease and franchise agreement, petitioners would have risked the substantial benefits which the judgment afforded them. These benefits included immunity from eviction, immunity from substantial damages arising out of petitioners' refusal to surrender possession, continued performance of the lease, and continued performance of the franchise agreement.

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[3]This contention is, however, not correct, as is demonstrated *infra*, pages 50-54. If the lease and franchise agreement were illegal, respondent Paramount, under California law was, as owner of the theatre, entitled to possession.

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If this judgment on the First, Second and Fifth Causes of Action were to become final, petitioners would then be entitled to the benefit of having respondents perform the lease and franchise agreement.

A policy calculated to enable petitioners to retain these benefits while attempting to assail the findings and conclusions upon which they are based recommended itself to them. Petitioners' apparent plan was to seek to avoid the burden of Finding 20 by collaterally attacking the same in their appeal from that part of the judgment which dismissed the Counterclaims.

Pursuant to this policy, petitioners appealed from that part *only* of the judgment of the Court "wherein it is ordered, adjudged and decreed that the first, second and fourth counterclaims of third party plaintiffs Partmar Corporation and Fanchon & Marco, Inc., be, and the same are, each dismissed with prejudice, and the defendants take nothing by reason of said counterclaims". [Tr. 111-112]. Petitioners appealed from no other part of said judgment.

The real question raised by this review is whether such a dubious stratagem shall be permitted to succeed. May petitioners, while continuing to enjoy the benefits of a judgment predicated upon one state of facts urged by them in the proceeding in which such judgment was rendered, be permitted to assert the direct contrary when it would benefit them to do so in connection with their Counterclaims? Stated another way, petitioners take a most unconscionable position. They, in effect, want the benefit of the judgment continuing them in possession of the theatre. They want the benefit of having Paramount perform the franchise as legal. Yet, at the same time,

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they seek to recover treble damages from Paramount on the theory that the lease and franchise are illegal as violative of the antitrust laws.

The Court of Appeals for the 9th Circuit considered the inequity of petitioners' claims so patent that it affirmed by a *per curiam* opinion without further statement of reasons. [Tr. 432.]

12. First, Second and Fifth Causes of Action Were Brought by Respondent Paramount in an Attempt to Comply With the Requirements of Law.

Respondent Paramount felt that it was necessary to bring the First, Second and Fifth Causes of Action to terminate the lease, in view of the pronouncement of the Expediting Court in the 1946 decree adjudicating all franchises to be illegal. The action thus was an attempt to comply with the 1946 decree which appeared to determine, before an appeal was taken to this Court, that all franchises were illegal *per se*. In order to have this matter determined, the preliminary steps were taken, and the action was brought to settle this question. Respondent Paramount sought a declaratory judgment as to the rights and duties of the parties under the circumstances. Before the case came on for trial, this Court rendered its opinion in 1948 remanding the case for further trial and determining that franchises are not illegal *per se*, though franchises may be illegal if they incorporate objectionable features. The qualifications stated in the opinion of this Court regarding the legality of franchises required respondent Paramount to continue with the test of illegality of the Partmar franchise. The purpose of the action was, therefore, to adjudicate whether the franchise violated the standards of the Sherman Act as interpreted by the opinion of this Court. The trial court determined

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that the franchise in question was legal and did not violate the standards of the Act as stated in the opinion of this Court or the Sherman Act generally.

Summary of Argument.

In order to recover upon the First, Second and Fourth Counterclaims, petitioners must prove that the picture and theatre rentals and other terms embodied in the franchise and lease were imposed as part of a conspiracy to restrain or monopolize trade.

Having successfully urged in defense of the First, Second and Fifth Causes of Action that the lease-franchise between petitioner Partmar and respondent Paramount were neither a part of nor entered into as the result of any agreement, combination or conspiracy of any kind, petitioners are now precluded and estopped to assert or prove that the terms, conditions and charges provided therein were imposed as the result of or as part of such a conspiracy. Being thus precluded and estopped to prove this fact of connection between said terms, conditions and charges and any conspiracy, petitioners cannot prove a fact material to recovery upon their Counterclaims.

Petitioners are likewise precluded on principles of *res judicata* from establishing the required connection between the alleged excessive terms, conditions and charges provided by said lease-franchise agreement and any conspiracy. The issue of connection between the lease-franchise agreement and any conspiracy was properly raised, considered and adjudicated in the trial of the First, Second and Fifth Causes of Action.

The conclusiveness of this adjudication in relation to the Counterclaims is not affected by the addition of counter-defendants not parties to the First, Second and Fifth

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Causes of Action because: (1) the defense of *res judicata* is available to any person so long as the party against whom it is asserted was a party to the litigation in which the issue was litigated, and (2) it is impossible for the lease and franchise to be a part of any conspiracy by the third party defendants if it is not a conspiratorial act of respondent Paramount (and it is *res judicata* that it is not such an act of respondent Paramount).

Since petitioners could not possibly prove their Counterclaims if they went to trial thereon, the judgment dismissing such Counterclaims should be affirmed. The material fact of connection between the alleged excessive terms, conditions and charges contained in the lease-franchise agreement is no longer at issue. Summary disposition of the Counterclaims was therefore appropriate. The method by which said Counterclaims were disposed of afforded petitioners the kind of hearing which is appropriate under such circumstances and was therefore proper. Even if this method should be considered questionable, it is apparent that petitioners can have suffered no prejudice by the dismissal of their Counterclaims upon which they can, under no circumstances, recover.

The order of this Court limiting certiorari to a review only of the dismissal of the counterclaims renders it improper for petitioners to argue that other parts of the judgment with regard to runs and clearances constitutes a nullification of the decree of the New York Court in *United States v. Paramount Pictures, Inc., et al.* Moreover, the judgment based on the First, Second and Fifth Causes of Action with respect to runs and clearances has no effect, in fact, to nullify the authority of the New York decree in *United States v. Paramount Pictures, Inc.*

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ARGUMENT.

I.

TO RECOVER UPON FIRST, SECOND AND FOURTH COUNTERCLAIMS, PETITIONERS MUST PROVE THAT TERMS, CONDITIONS AND CHARGES PROVIDED IN THE LEASE AND FRANCHISE AGREEMENT WERE IMPOSED AS A RESULT OF OR AS A PART OF A CONSPIRACY TO RESTRAIN OR MONOPOLIZE INTERSTATE TRADE.

The First, Second and Fourth Counterclaims allege that the counter-defendants engaged in a conspiracy in restraint of trade and commerce among the states in the distribution and exhibition of motion pictures and that this conspiracy was the same conspiracy as that stated in the complaint in *United States of America v. Paramount Pictures, Inc., et al.* [Tr. 36-37.] This conspiracy is then alleged to have been carried out in three different ways to the damage of petitioners.

In the First Counterclaim it is contended that "as part of the aforesaid conspiracy" the counter-defendants "have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges for the photoplays made and released by them . . ." [Tr. 38-39].

In the Second Counterclaim it is alleged that, pursuant to this conspiracy, respondent Paramount Pictures Theatres Corporation required petitioner Partmar to "pay to it, in addition to the rentals stipulated in the lease, 50%

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of the net receipts of the operation of the theatre." [Tr. 40.]

The Fourth Counterclaim has by oversight been omitted from the transcript of record. The alleged aspect of the conspiracy therein set forth, however, is that "as part of the aforesaid conspiracy, the plaintiff and third-party defendants have required Partmar Corporation to receive and make payment for licenses to exhibit short subject photoplays not desired, needed or exhibited by Partmar at the Paramount Theatre."

The terms, conditions and charges made by respondent Paramount and paid by petitioner Partmar for the photoplays made and released by respondent Paramount are embodied in the franchise. [Pl. Ex. 3; Tr. 246-295.] The provision for the payment of 50% of the net receipts of the operation of the theatre in addition to the rental stipulated in the lease is contained in the amendment to the lease. [Pl. Ex. 2; Tr. 223-244, 226.] The charges for the short subjects are also contained in the franchise agreement. [Pl. Ex. 3; Tr. 264.] Thus the gravamen of the First, Second and Fourth Counterclaims is that the lease and franchise agreement were entered into as a part of or were the result of the conspiracy described, and the terms, conditions and charges therein embodied were imposed as a result of and as part of said conspiracy.

The nature of the Counterclaims is further illustrated by their characterization made in the Petition for Certiorari where, referring to the franchise, it is stated that the

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"restrictions of the contract were in fact parts of such a conspiracy," and "that the picture and theatre rentals were affected by the conspiracy in restraint of trade" (Pet. 25). Similarly, the basis of the Counterclaims is described (Pet. 6) "Paramount . . . had compelled petitioner to pay the excessive theatre rentals and license fees for pictures needed for the theatre."

The Counterclaims make no general complaint that Partmar was damaged by being placed in a position of competitive disadvantage in relation to other exhibitors and allege no damage thus arising. Instead, Partmar alleged that it was required to give excessive consideration for the position of competitive advantage that it enjoyed. Unless, therefore, Partmar can prove that the lease and franchise agreements in which this alleged excessive consideration was provided were a result of or part of the conspiracy alleged, it cannot recover.

Petitioners assert (Pet. Br. 16) that "the particular kind of contract on which petitioners procured pictures, and the particular kind of lease on which they held the theatre, was immaterial to their claim for treble damages." This is, of course, obvious. What petitioners do not explain, however, is how the terms, conditions and charges contained in the lease and franchise agreements can have been a part of or the result of a conspiracy if these agreements themselves were not.

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II.

PETITIONERS ARE NOW PRECLUDED AND ESTOPPED FROM PROVING IN SUPPORT OF COUNTERCLAIMS THAT LEASE AND FRANCHISE ARE PART OR RESULT OF A CONSPIRACY, HAVING SUCCESSFULLY ASSERTED IN DEFENSE OF FIRST, SECOND AND FIFTH CAUSES OF ACTION THAT SAID AGREEMENTS WERE NOT PART OF OR RESULT OF ANY SUCH CONSPIRACY.

Petitioners successfully defended against the First, Second and Fifth Causes of Action on the ground, among others, that the Lease and Franchise were not a part of any conspiracy. They are now precluded and estopped from attempting to show that some parts of the Lease and Franchise were imposed on them as the result of any conspiracy.

A. PETITIONERS HAVE SUCCESSFULLY ASSERTED IN DEFENSE OF FIRST, SECOND AND FIFTH CAUSES OF ACTION THAT LEASE AND FRANCHISE AGREEMENTS WERE NOT PART OF OR THE RESULT OF ANY CONSPIRACY IN RESTRAINT OF INTERSTATE TRADE.

The legality of the lease and franchise was a principal issue in the trial of the First, Second and Fifth Causes of Action. Petitioners prevailed on this issue, and they did so by convincing the Court, which had heard evidence with respect thereto, that the lease and franchise were the result solely of an agreement between petitioner Partmar and respondents. The fact that the legality of the lease and franchise was an issue properly involved in the trial of the First, Second and Fifth Causes of Action, is

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demonstrated *infra,* Chapter III, pp. 44-54. Petitioners were aware not only of the fact that respondents claimed this was a principal issue in the case but early in the trial were likewise advised that the Court considered it an issue in the case and would not deny respondents possession of the theatre without holding that the franchise and lease were lawful agreements. The District Court said [Tr. 142]:

> "But if you are successful in establishing, or if Mr. Chance is successful in establishing that we have a condition here that was an unreasonable restraint of trade, then I think I am going to have to find, as a matter of law, that Paramount was entitled to terminate its lease."

This remark of the Court must be construed in relation to the earlier remark made by the Court quoted herein, *supra,* page 8, to the effect that the provisions of the franchise according Partmar a ten-year license for the first-run exhibition of Paramount pictures and establishing a clearance over all subsequent runs thereof raised a serious question in his mind as to whether Partmar was not thus afforded an unreasonable competitive advantage over other exhibitors. The Court had thus served notice upon petitioner Partmar that he was interested in knowing whether the franchise agreement which afforded Partmar these advantages was merely an agreement between Paramount and Partmar, an independent exhibitor, or was in fact a part of a conspiracy involving other distributors and exhibitors.

The Court itself asked questions of a witness to determine whether the clearance provided by the franchise was the result of an agreement between any persons other than petitioners and respondents. The answers to these

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questions [Tr. 135-136] indicated that in determining the clearance for the theatre operated by petitioner Partmar, Paramount officials acted completely on their own responsibility and without regard to the clearance accorded by other distributors. The Court also asked questions with regard to whether there was any combination or agreement relating to other features of the lease and franchise, receiving answers in the negative. [Tr. 52.]

The Court specifically inquired of counsel for petitioners if he intended to offer any evidence to the contrary and thus invited petitioners to submit such proof. Counsel for petitioners represented that he thought there would be some evidence to that effect. [Tr. 136.] The colloquy of the Court and counsel for petitioners in this regard is as follows:

> "The Court: May I ask, Mr. Hardy, is there going to be any evidence to show that Paramount in conjunction with any other distributor, say Fox-20th Century or Warner Bros., got together and conspired to make these different clearances among the different localities?
>
> Mr. Hardy: I think there will be some evidence to that effect.
>
> The Court: There will be?
>
> Mr. Hardy: Yes, sir.
>
> The Court: All right.
>
> Mr. Hardy: I say I think so. I am not sure. I think we may introduce that.
>
> The Court: Mr. Smith said that there wasn't, so I was just wondering if there was going to be any evidence to the contrary.
>
> * * * * * * * *
>
> The Court: There is nothing in this case so far, as far as I know, to show Paramount got together with any other distributor and attempted to divide

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up the territory or attempted to divide up the theatres, or attempt to divide up the clearances." [Tr. 136-137.]

However, counsel for petitioners never offered any evidence of a conspiracy with regard to the run and clearance or any other features of the lease-franchise agreement.

The Trial Court, moreover, pointed out to counsel both the significance of the legality of the lease and franchise and the significance of the issue of conspiracy in the determination of such legality. At an early stage in the case, the Court said [Tr. 47]:

> "But here, the question is, was this franchise agreement legal or illegal under the Sherman Act?"

During the trial the Court pointed out the significance of the issue of conspiracy with respect to the legality of the run and clearance provisions of the lease-franchise agreement [Tr. 137-8, 143], saying [Tr. 143]:

> "If there is a conspiracy, as I said, if the parties have gotten together, all the producers and all the exhibitors have got together and . . . determined who should have first run, the second run, and so forth, that would be an entirely different situation than we have here at bar."

Instead of offering evidence of conspiracy, counsel for petitioners in their Closing Brief filed with the Trial Court after conclusion of the evidence directly contended that there was no connection between any conspiracy and the lease-franchise agreement. In said Brief, petitioners urged upon the Court:

> "On the evidence in this case the *Partmar franchise* is neither one of a system, or made by one holding a dominant position, or *pursuant to a conspiracy.*" [Tr. 65.]

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Petitioners additionally urged upon the Trial Court at the conclusion of the trial and in their Closing Brief that the first-run privileges accorded Partmar by the lease-franchise agreement were not in violation of the Sherman Act, because said agreement was a *"single"* agreement, necessarily implying that it was unconnected with any conspiracy:

> "No case has held that a *single* exclusive dealing contract applying to as little as 12% of the supply, is violative of the antitrust laws." [Tr. 64.]

Petitioners likewise asserted in their Closing Brief in the trial court:

> "A *single* contract between one film company and one exhibitor, is not violative of the Sherman Act." [Tr. 58.]

Petitioners also urged in their Closing Brief in the trial court, that "conspiracy" was a necessary element in the proof of illegality of the franchise [Tr. 47], and asserted that "the absence of conspiracy is equally fatal" [Tr. 52] to such proof.

Further proof that petitioners urged that there was no connection between any conspiracy and the lease-franchise agreement is found in the District Court's understanding of petitioners' contentions as expressed after the conclusion of the trial. The Court said [Tr. 144]:

> "Mr. Hardy definitely argued with me that at most—these are his words—that at most this was a contract between one producer, one theatre. He emphasized the 'one' time after time. He emphasized that *no other parties were interested*, and it is just one contract between one producer or one distributor and one exhibitor."

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In view of the above demonstration, there can be no question but that petitioners knew at the trial that the Court had under consideration the question whether the lease and franchise were unlawful by reason of being the product of a conspiracy between respondents, petitioner Partmar and other distributors and exhibitors. Petitioners defended the lawfulness thereof by asserting the independence of said franchise from any conspiracy.

The success with which petitioners urged the lack of connection between any conspiracy and the terms of the lease and franchise agreement is made apparent by the findings, conclusions and judgment of the Court. The Court concluded that the lease and franchise agreement between Paramount and Partmar were "in all respects legal." [Tr. 106-107.] It further concluded that "the clearance accorded to Partmar by Paramount pursuant to said franchise agreement was reasonable and *lawful.*" [Tr. 106-107.] In support of these conclusions just set forth are Finding 18 and Finding 20. In Finding 18 the clearances allowed petitioner Partmar for the Paramount Theatre is found to be reasonable and to apply only to theatres in substantial competition [Tr. 103], and in Finding 20 the Court found:

> "Neither said franchise agreement, nor said lease, nor any amendment to either of them constitute any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, *nor between Partmar and any other person or persons.*" [Tr. 104.]

The italicized portion of this finding would, of course, be meaningless if the Court were not considering the legality of the competitive advantages afforded petitioner Partmar by the lease and franchise. As heretofore pointed out, the Court stated it was considering this question. (*Supra,* p. 8.)

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It is thus apparent that petitioner Partmar successfully asserted in defense of the First, Second and Fifth Causes of Action that the franchise and lease agreement were no part of any conspiracy in restraint of trade. They could not have obtained judgment sustaining their right to remain in possession of the theatre and to be free of damages for withholding such possession nor could they have obtained judgment declaring their right to continued performance of the lease and franchise had they not been successful in persuading the District Court that such was the case.

1. Issue Was Not Limited by Alleged Exclusion of Evidence or Striking of Affirmative Defenses in Petitioners' Answer.

To rebut this conclusive showing that the issue of connection between the lease and franchise agreement and any conspiracy was an issue in the determination of the First, Second and Fifth Causes of Action, petitioners point to alleged exclusion of evidence in relation to conspiracy. (Pet. Br. 9, 18-19.) In this respect petitioners specify the striking of the defenses pleaded by petitioners and the admission into evidence of the judgment in *United States v. Paramount Pictures, Inc.*, for the limited purpose of showing the injunctive provisions thereof. None of these matters give any indication that the issue was as contended by petitioners "confined to the question whether the franchise was in unlawful restraint of trade standing alone and apart from conspiracy." (Pet. Br. 19.)

Illegality of the lease and franchise, if proved, would have established the First, Second and Fifth Causes of Action.[4] Consequently, such illegality was a material is-

[4]See discussion, *infra*, pp. 50-54.

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sue. The affirmative defenses set forth in petitioner's Answer were stricken because, of necessity, the illegality which would establish the First, Second and Fifth Causes of Action could not be a defense thereto. Nevertheless, the issue of whether the lease and franchise were legal, including the issue of whether they were connected with any conspiracy, remained in the case.

The Court did not, as contended (Pet. Br. 9), refuse "to give the judgment [in *United States v. Paramount Pictures, Inc.*] any evidentiary effect at all as to the existence of the conspiracy." Petitioners' statement attempts to create the impression that the Court would not permit petitioners to introduce the judgments in *United States v. Paramount Pictures, Inc.* into the record as a part of their evidence on the First, Second and Fifth Causes of Action. (Pet. 9-10.) This impression could not be further from the truth. The fact is that the Court invited petitioners to introduce it as a part of their evidence. The Court said:

> "Well, when it comes your turn, if you want to introduce it or make a motion that it be received *in toto* you can." [Tr. 131.]

Petitioners well knew that their turn was when they put on their case-in-chief with respect to the First, Second and Fifth Causes of Action. Nothing in the Court's remark suggests that he referred to the trial of the Counterclaims. Petitioners, however, made no effort to have the judgment received *in toto* though they took several court days to present their case in chief. Moreover, the Court said in this connection:

> "It is before the court and the court would read the decision in any event without it being introduced into evidence." [Tr. 130.]

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B. A PARTY WHO ASSUMES A CERTAIN POSITION IN A LEGAL PROCEEDING, AND SUCCEEDS IN MAINTAINING THAT POSITION, IS PRECLUDED AND ESTOPPED FROM ASSERTING A CONTRARY POSITION THEREAFTER.

Litigants may not play fast and loose with courts of justice. Consequently, when they have once asserted a given position in a legal proceeding and have succeeded in having the court adopt this position, they may not thereafter urge a contradictory view. This rule, which has been applied in a wide variety of circumstances, is well founded in both authority and reason.

A leading case is the decision of this Honorable Court in *Davis v. Wakelee,* 156 U. S. 680 (1895). In an action for an injunction to restrain the defendant from asserting the invalidity of a judgment in other suits to be brought thereon, it was admitted by the parties and held by the court that the judgment actually was void for lack of personal service upon the defendant. However, in a prior proceeding in which defendant was adjudicated bankrupt and was given a discharge, plaintiff had opposed discharge. He had been defeated in this opposition by the assertion advanced by defendant that since plaintiff had obtained a state court judgment which was in full force and effect, a discharge would not affect his claim, and he therefore had no standing to object thereto. The trial court held the defendant estopped to raise the invalidity of the prior judgment and enjoined him from doing so.

In affirming this judgment, the Court said:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his inter-

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ests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him . . .

"It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it. He obtained an order which he could only have obtained upon the theory that the judgment was valid—his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position." (Pp. 689 and 691.)

The decision in *Davis v. Wakelee, supra,* is discussed in *Davis v. Cornwall,* 68 Fed. 522 (2d Cir., 1895), cert. den. 163 U. S. 683. In this companion action the same debtor sought to set up his discharge in bankruptcy as a defense to a judgment in favor of another creditor whose objections to his discharge had also been overruled by the bankruptcy court on the "ground (urged by the bankrupt) that the discharge could not affect the judgment." The decision in *Davis v. Wakelee, supra,* was held controlling. In this respect the court said:

"This decision is controlling, and renders any discussion of the question now before us superfluous. The appellant attempts to parry the force of the decision by urging that the case then before the court

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differed from the present case, inasmuch as the estoppel was based upon the defendant's false assertion of fact in the bankruptcy proceeding that the judgment was in full force. The court, however, *did not consider the case upon the rules applicable to the common estoppel which springs from the misrepresentation of fact, but put its conclusions upon the salutary doctrine of estoppel, which prohibits parties from playing fast and loose with the courts of justice.*[5] Indeed, all the statements in the petition which was the basis of the order in the bankruptcy proceedings were matters of legal conclusion; and the court was of the opinion that although the defendant, in making them, was under a mistaken view of the law, that circumstance could not shield him from the effect of an estoppel. The plaintiff, as well as the defendant, was bound to know the law, and, by conclusive presumption, *could not have been misled* by the defendant's statement that the judgment was in full force, when in fact it was a nullity, because of want of jurisdiction of the court which rendered it. *He was prejudiced, not by any false statement of the defendant, but by the conduct of the defendant in procuring a disposition of his legal rights by a judicial tribunal to his disadvantage, and for the benefit of the defendant; and if he chose to acquiesce the defendant ought not to be permitted now, with the fruits of his conduct in his hands, to assert that what he then maintained was a delusion, and that the disposition made was wrong.*" (P. 525.)

It is submitted that this analysis of the decision in *Davis v. Wakelee, supra,* is correct and that so construed it is directly applicable to the facts in the present case. Peti-

[5]Italics here and elsewhere in this brief are added unless otherwise noted.

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tioners have "the fruits" of their "conduct" in their hands in the form of performance of the franchise for the balance of its term, exhibiting first-run in Los Angeles all Paramount pictures licensed thereunder, to the exclusion of all other exhibitors, and with full clearance over all theatres in the Los Angeles area together with their immunity from damages and eviction and the declaration of their right to continued performance of the lease and franchise. To permit them now to contend that the lease and franchise are parts of an unlawful conspiracy would be to allow them to play "fast and loose with courts of justice."

The same rule was applied by this Honorable Court in *Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard,* 54 U. S. 307 (1851). The plaintiff and his brother had previously instituted an action against the defendant's corporate predecessor which merged into defendant between the time the former action was filed and the time it was tried. In this former action plaintiffs relied upon a certain document as being a valid existing contract of this predecessor corporation. Counsel for the defendant appeared in the name of the predecessor and asserted that a different document was the valid controlling contract in issue. The court in the other proceeding ruled for the defendant therein on the basis of this contention. Thereafter plaintiff commenced the subsequent suit relying on the document set up by the defendant in the prior action as being the controlling document. The defendant, however, reversed its contention and denied the document's validity for lack of the corporate seal. The court below instructed the jury that if it found the facts to be as above set forth, the defendant should not be permitted to deny the validity of the

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document sued on. The judgment was for the plaintiff and it was affirmed on appeal. The Court said (p. 336):

> "Defendant . . . defeated the action in Cecil County Court, by asserting and maintaining this paper to be the deed of the company . . .
>
> "We are clearly of opinion that the defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, *and it is too late to correct it.* It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form should sustain another on a like point."

To like effect is *Officer v. J. L. Owens Co.,* 252 Fed. 337 (8 Cir., 1918). The defendant in the present action had sued the plainitff in a prior action for breach of the conditions of a contract. He had given six promissory notes to secure performance. In the course of the trial of this prior action, the court instructed the jury that one of the elements of damage would be the face value of the six promissory notes since the plaintiff therein continued to be liable thereon. A judgment was rendered for the plaintiff in that action, the defendant in the present action, and the same became final. In the present action, upon being sued upon the notes, he defended on the ground that the notes were voidable for lack of consideration, this position being inconsistent with the theory upon which he was awarded damages including the face amount of the notes in the preceding action. The court held that the defense of lack of consideration could not be raised by defendant, saying (p. 342):

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> "There is another reason why he may not defeat the enforcement of his liability upon these notes, and that is that he has obtained and has collected a part of a judgment against the Company for damages allowed to him in No. 338 on the express ground that he is liable to pay the notes for $10,000 and interest. *His acceptance of the benefit of the first judgment raises a quasi estoppel against him from asserting in this action that he is not liable.*"

In this particular case it is notable that the person held estopped had not even urged the court in the prior proceeding to adopt the inconsistent view. He had not, however, corrected the court in this respect, and this was held a sufficient basis for preventing him from taking the contrary position. The court said (p. 343):

> "If there was error in those respects in the trial of No. 338, *counsel could have corrected them in that case, but it cannot do so in this.*"

In *Queenan v. Mays,* 90 F. 2d 525 (10th Cir., 1937), cert. den. 302 U. S. 724, a prior action had been brought by Mays to recover from a county certain bonds deposited by Mays in a bank, which had in turn been pledged by the bank to the county to secure the latter's deposit with the bank. Neither the bank nor its later appointed receiver was a party to this prior action. In this prior action the court held in favor of the county on its contention that it had accepted the bonds as a pledge of the bank's assets and was a bona fide purchaser thereof. In the present litigation brought by Mays against the bank and its receiver for the value of the bonds, the receiver cross-complained against the county, seeking to recover from it the value of the bonds on the ground that the bank had no power to secure its deposits by pledging its

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assets. The county defended this cross-complaint on the ground that the bonds were not pledged as assets of the bank but as Mays' bonds. This was a theory which was of course directly contrary to that asserted in the former action. The court refused to permit this defense to be made by the county, saying (p. 533):

> "Furthermore, the county is in no position to assert the bonds were pledged as Mays' bonds and not as bonds of the bank. The county defeated Mays in the state court suit by establishing the fact that it took the bonds as the property of the bank. It here seeks to defeat the bank by establishing the fact that the bonds were the property of Mays. The county must be consistent. Since Mays never authorized the pledge, the county could only prevail as to Mays by showing that it dealt with the bonds as property of the bank; failing in that, it must have lost as to Mays. Having taken that position, it should not now be permitted to defeat the receiver by reliance upon the fact that the bonds were not the property of the bank . . .
>
> ". . . The apposite principle of law is laid down in Davis v. Wakelee, 156 U. S. 680, 689, 15 S. Ct. 555, 558, 39 L. Ed. 578, as follows: [quoting portion quoted *supra.*]"

In *Chandler v. McKerral,* 68 F. 2d 343, 346 (7th Cir., 1934), the defendant receiver of an insolvent corporation was held estopped to deny the plaintiff's claim of prior right to a court deposit made by such receiver. The deposit had been made in order to vacate a temporary restraining order in a prior stage of the proceedings. In an intervening proceeding *between the receiver and a different creditor,* such receiver had represented to the court that the present plaintiff's claim had priority as to these

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moneys and that they therefore could not be attached by such second creditor. In the last proceeding, the receiver asserted that plaintiff's claim had no such priority. In precluding the receiver from making this last assertion, the court said:

> "This position thus solemnly and deliberately taken cannot now be repudiated."

To the same effect: *Hughes v. Ward Oil Corporation,* 124 F. 2d 393, 395 (5th Cir., 1941).

This doctrine of preclusion against assertion of inconsistent positions in judicial proceedings, sometimes referred to as "judicial estoppel," though akin to *res judicata* and collateral estoppel, must not be confused therewith.

An excellent article, *Beck, "Estoppel Against Inconsistent Positions in Judicial Proceedings,* 9 Brooklyn Law Review, pp. 245-262, analyzes the doctrine. In this article, this doctrine is differentiated from *res judicata,* collateral estoppel, and other types of estoppel and its rationale analyzed. The author characterizes the rule as follows:

> "It is 'that a man should not be permitted "to blow hot or cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interests.'" (P. 245.)

and, further,

> "The gravamen of this type of estoppel, therefore, is not reliance by the other party to his resultant detriment, but rather in having deliberately taken a legal position, from which the courts will not permit one to recede, for purposes of convenience. *It is clearly a rule born of the necessity of orderly administration of our judicial system."* (P. 248.)

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The author cites and discusses numerous cases from a wide variety of jurisdictions as authority for this rule,[6] including those already briefed herein. In order to avoid lengthening this brief beyond proper bounds, we refer the Court to this article for a discussion of these cases. The author concludes the article by stating:

> "The foregoing cases demonstrate the effectiveness of this salutory doctrine as a restraining influence upon those *who would conduct themselves in a court-room as if it were a gaming room.* Repeated application thereof may compel an appreciation on the part of litigants, that observance of a high degree of honesty in their dealings with their adversaries and with the courts, is a rule of conduct which self-interest requires." (P. 262.)

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[6] *Houghton v. Thomas,* 220 App. Div. 415, 422, *et seq.,* 221 N. Y. Supp. 630 (1927), aff'd 248 N. Y. 523, 162 N. E. 509 (1928);
Horn v. Bennett, 253 App. Div. 630, 632, 3 N. Y. S. 2d 525 (1938);
Assets Realization v. Roth, 226 N. Y. 370, 374, 123 N. E. 743 (1919);
National Steamship Co. v. Tugman, 143 U. S. 28, 32 (1891);
McDonald v. Ruggiero, 144 App. Div. 230, 129 N. Y. Supp. 77 (1911);
The State National Bank of Keokuk v. The Northwestern Union Packet Co., 35 Iowa 226, 229, *et seq.* (1872);
Perkins v. Jones, 62 Iowa 345, 348, 17 N. W. 573 (1883);
Murray v. Rubel Coal & Ice Corp., 234 App. Div. 895, 254 N. Y. Supp. 372 (1931);
Hamilton v. Frothingham, 71 Mich. 616, 628, *et seq.,* 40 N. W. 15 (1888);
Folger v. Palmer, 35 La. Ann. 843 (1883);
Richards v. McCormick, 119 Mich. 7, 77 N. W. 1116 (1898);
Bond v. Clark, 88 Mass. (6 Allen) 361 (1863);
Hamilton v. Zimmerman, 37 Tenn. 38 (1857);
Greer v. Canada, 119 Tenn. 17, 107 S. W. 970 (1907);
Winkler v. Korzuszkiewicz, 117 Kan. 261, 231 Pac. 46, 48 (1924);
Mills v. Hoffman, 92 N. Y. 181, 189, *et seq.* (1883).
To same effect are:
Hassberger v. General Builders' Supply Co., 213 Mich. 489, 182 N. W. 27 (1921);
In re Madison, 32 N. M. 252, 255 Pac. 630 (1927).

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Another instructive article is found in 59 Harvard Law Review 1132-1136, where the author criticizes the confusion of this doctrine by some courts with the doctrines of collateral estoppel and *res judicata*. It is there pointed out that this doctrine is "a rule of public policy," which "arises out of the need to preserve the dignity of judicial proceedings and uphold the sanctity of the oath." (P. 1133.)

This same matter is treated in Bigelow on Estoppel (3rd Ed., 1882), page 601, as follows:

> "If parties in court were permitted to assume inconsistent positions in the trial of their causes the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men honest and dishonest are in the keeping of the courts, and consistency of proceedings is therefore required of all those who come or are brought before them.
>
> "It may accordingly be laid down as a broad proposition that one who has taken a particular position in the course of a litigation must, while that position remains unretracted, act consistently with it . . ."

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C. MUTUALITY IS NO PART OF THE DOCTRINE OF PRECLUSION AGAINST ASSERTION OF INCONSISTENT POSITIONS.

The fact that there are third party defendants to the Counterclaims who are not parties to the First, Second and Fifth Causes of Action does not affect the applicability of the rule just stated. Mutuality is not a requirement of preclusion and judicial estoppel. It is apparent from the nature of the doctrine, that any requirement of mutuality of estoppel is out of place. It is of no significance to the purpose of insuring orderliness, regularity and expedition in litigation or in protecting the dignity of judicial proceedings whether there is mutuality.

Beck, "Estoppel Against Inconsistent Positions in Judicial Proceedings," supra, 9 Brooklyn Law Rev. 245, states (p. 247):

> "Though there be no reliance and resultant damage, *nor mutuality,* one may nevertheless be estopped from asserting the truth, *not merely as to the parties to a litigation, or their privies, but generally and for all purposes.* In Philadelphia, Wilmington & Baltimore R. R. v. Howard, the contention that the estoppel was effective only as to the immediate parties in the prior proceeding, was overruled by the Supreme Court."

The comment in 59 Harv. Law Rev. 1132, *supra,* states (p. 1134):

> "The primary distinction in practice between the principle of preclusion on the one hand and *res judicata* and collateral estoppel on the other is that, while the latter doctrines require identity of parties, the former may be invoked by a person not a party to the first suit against one who was either a witness or a party in that suit . . .

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> "By clearly marking the distinction between these doctrines, a court dealing with inconsistent positions will be able to free itself from questions of privity and *mutuality,* which are concomitants of the *res judicata* principle."

In *Philadelphia, Wilmington & Baltimore R. R. Co. v. Howard,* 54 U. S. 307 (1851), referred to in the quotation from Beck, *supra,* the Court, in treating of the admissibility of the evidence concerning the assertion of validity of the contract in the prior proceeding, which evidence was held sufficient to prove an estoppel, said:

> "It is objected that the parties to that suit were not the same as in this one; but this is wholly immaterial. The evidence does not derive its validity from any privity of parties." (P. 332.)

This Honorable Court reached the same conclusion in *Missouri v. Chi. B. & Q. R. R.,* 241 U. S. 533 (1916). The railroad had brought a prior injunction suit against state officers to restrain enforcement of a statute fixing railroad rates claimed to be confiscatory. The state was not a party to this proceeding, which determined rates were nonconfiscatory. In an action by the state to recover the amount of passenger fares in excess of rates established, the railroad was held estopped to assert the defense of confiscation. As stated by the Court (p. 541):

> ". . . The contention is that the previous decree is here inapplicable since the state was not a party to the litigation in which the decree was entered, indeed, could not have been made a party without its consent."

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The Chief Justice pointed out that (p. 542):

> ". . . the question here is not how far the decree relied upon was binding upon the parties who were not technical defendants, but how far it is binding upon the railroad."

The basis of the estoppel imposed was the inconsistency of the positions taken by the railroad. The Court said (p. 542):

> "The right to restrain the whole power having been enjoyed for the purpose of the complaint as to confiscation which was made, the contrary cannot be asserted in order to escape the effect of the decree holding that such complaint was erroneously made."

And (p. 543):

> "As it results from what we have said that in our opinion by the application of the most elementary principles of estoppel the railroad may not be heard to disavow what it asserted in order to secure the suspension of the rate law during the suit, it follows that it was without right in this case to assert the defense of confiscation and the motion to strike out the same must therefore prevail."

In both *Queenan v. Mays,* 90 F. 2d 525, ***supra,*** and *Chandler v. McKerral,* 68 F. 2d 343, ***supra,*** there was no mutuality of estoppel, yet the litigant who was a party to the prior litigation was held to be precluded from taking inconsistent positions.

To same effect:

> *Rand v. Gillette,* 199 N. C. 462, 154 S. E. 746 (1930).

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III.

THE FACT THAT THE LEASE AND FRANCHISE AGREEMENT DID NOT CONSTITUTE ANY PART OF AND WERE NOT A RESULT OF ANY CONSPIRACY IN RESTRAINT OF INTERSTATE TRADE IS RES JUDICATA.

In the trial of the First, Second and Fifth Causes of Action, the issue of the legality of the lease and franchise agreement was raised by the pleadings, litigated by the parties and properly considered by the Court. The determination made of this issue was that the lease and franchise agreement were not a part of or the result of any conspiracy in restraint of interstate trade, and therefore were lawful. This determination, made in the trial of the First, Second and Fifth Causes of Action, is conclusive against petitioners in respect of their First, Second and Fourth Counterclaims.

A. THE ISSUE OF CONNECTION BETWEEN THE TERMS OF THE LEASE AND FRANCHISE AGREEMENT AND ANY CONSPIRACY WAS IN ISSUE, WAS LITIGATED AND WAS DETERMINED IN TRIAL OF FIRST, SECOND AND FIFTH CAUSES OF ACTION.

The issue of connection between the lease and franchise and any conspiracy was actually litigated at the trial of the First, Second and Fifth Causes of Action. It was properly so litigated since it was raised by the pleadings. The consideration of this issue by the Court was necessary under California law, and did not involve enforcement of rights arising out of an illegal contract. The result of the litigation of this issue was the determination by the Trial Court that the lease and franchise

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were not connected with any conspiracy, not merely that these agreements were lawful "standing alone."

1. THE ISSUE OF CONNECTION BETWEEN THE TERMS OF THE LEASE AND FRANCHISE AND ANY CONSPIRACY WAS LITIGATED.

As is demonstrated in Chapter II-A, of this brief *infra,* (pp. 23-29) the issue of the legality of the lease and franchise agreement was a principal issue in the trial of the First, Second and Fifth Causes of Action, and a subsidiary issue upon which its determination depended was whether the lease and franchise agreement were part of or the result of any conspiracy in restraint of interstate trade. It is there demonstrated that in order to sustain the validity of the provisions of the lease and franchise agreement giving petitioner Partmar a license to exhibit all of respondent Paramount's product first run and with a clearance over all subsequent runs, for a period of ten years, petitioners were obliged to urge that the lease and franchise agreement was a single agreement between respondents and petitioners and not a part of or a result of any conspiracy with other persons.

2. THE LEGALITY OF THE LEASE AND FRANCHISE AGREEMENT WAS PLACED IN ISSUE BY THE PLEADINGS.

The First, Second and Fifth Causes of Action sought restitution of possession of the theatre and a declaration that the lease had been terminated. [Tr. 25.] Paragraphs 12 and 13 of the complaint [Tr. 17] state a claim on the part of respondents that the lease was terminated *by reason of the fact that the franchise was terminated.* The Court found [Tr. 96] that though two documents were executed the lease and franchise agree-

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ment constituted but one inseverable agreement. The facts supporting this finding were fully pleaded. [Tr. 5-11.]

An agreement which is illegal is in law terminated. *Doherty v. Monroe Eckstein Brewing Co.,* 191 N. Y. S. 59 (1921), where the court said:

> ". . . When, therefore, on the 29th of January, 1920, the principal use of the premises for saloon purposes became *unlawful, the lease became terminated by operation of law* in the absence of any agreement between the parties for a different use of the premises thereunder . . . There is no distinction in principle on this point between a contract the execution of which is unlawful at the time it is made and which is void under the authorities cited and one where by a subsequent change of law further performance of the contract becomes unlawful." (Pp. 61-62.)

To the same effect, see *O'Neill v. Derderian,* 246 N. Y. S. 341, 344 (1930), where the court said:

> "The express restricted purposes of the hiring now being prohibited by law, *the lease is brought to an end.*"

Though respondents did not plead the conclusion that the franchise was unlawful, the facts bearing upon its legality were pleaded.

In Paragraph VI of the complaint [Tr. 8-9], the terms of the franchise which raised the issue of its legality are fully set forth, including the provision granting Partmar a license upon all Paramount pictures first run for a period of ten years.

Under the Federal Rules of Civil Procedure, the pleadings were sufficient to raise the issue of whether the

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franchise violated the Sherman Act and therefore the entire lease and franchise agreement was unlawful and terminated by operation of law. Under these Rules, the purpose of pleadings is to give fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved. A plaintiff accordingly is not held to the exact allegations of his complaint; any facts proved which justify the relief sought and fall within the category naturally supporting the general claim asserted are properly considered by the court.

The sufficiency of pleadings to raise this identical issue was considered in *Southside Theatres v. United West Coast Theatres Corp.*, 178 F. 2d 648 (9th Cir., 1949). The defendant attacked the jurisdiction of the District Court on the ground that no federal question was raised in the complaint. The complaint, as does the complaint herein, recited the facts as to the provisions of a joint venture contract between the parties and described the findings and conclusions made in *United States v. Paramount Pictures, Inc.* The plaintiff likewise relied upon the agreement contained in the contract with respect to which declaratory relief was sought, to the effect that the venture should be terminable in the event performance should be enjoined. The jurisdiction of the District Court was upheld. The Court of Appeals described the allegations of the complaint held sufficient in this respect as follows (p. 651):

> "While it appears from the foregoing summary that the plaintiffs *stressed their right to terminate the joint venture agreement pursuant to the provisions of the termination agreement and the proceedings in the antitrust suit brought by the government*

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> *in the New York District Court,* we think the complaint nevertheless sets forth sufficient facts *to raise the issue that the joint venture agreement violated the Sherman Act.* It is alleged that plaintiffs and defendants, competitors in the theatre business, entered into a contract for the joint operation of their rival theatres under an arrangement whereby the profits were to be shared but both properties were to be under the direction and control of the plaintiffs, and that other similar pooling arrangements had been held to constitute violations of the Sherman Act. Although not well pleaded, and lacking the emphasis given by the pleader to the termination agreement and the findings and decree of the New York District Court, such factual allegations, we think, sufficiently show a substantial controversy with reference to the validity of the joint venture agreement under the Sherman Act, in the posture of the instant case."

This holding upon facts practically indistinguishable from those in this case is amply supported by other decisions dealing generally with the sufficiency of pleadings under the Federal Rules of Civil Procedure.

Continental Colleries v. Shober, 130 F. 2d 631, 635 (3rd Cir., 1942), states the rule as follows:

> "Under the Federal Rules of Civil Procedure the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved . . . Technicalities are no longer of their former importance, and a short statement which fairly gives notice of the nature of the claim is a sufficient compliance with the requirements of the rules."

Komer v. Shipley, 154 F. 2d 861 (5th Cir., 1946), dealt with the question of variance between the pleadings

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and the proof under Federal Rules of Civil Procedure, and held that the plaintiff is not required to prove the exact allegations of this complaint, the court saying (pp. 862-863):

> "Since the plaintiff's pleading afforded defendant a generalized summary of the case, it complied with the rules of pleading applicable to the federal district court.
>
> "Vol. 1, Moore on Federal Practice, at page 450, states:
>
> > " 'The pleading rules are designed to develop the respective stories of the parties as to the past events out of which the litigation grew. They are not restricted by worry and confusion about the form of trial.
> >
> > * * * * * * * *
> >
> > " '* * * at the trial stage the case is to be heard on the merits, *and is not to be* hamstrung by faulty pleadings, unless actual, not conjectural, prejudice results from the faulty pleadings.' "

Counsel for respondents made it plain that the issue of legality of the lease and franchise was necessarily involved in the trial of the First, Second and Fifth Causes of Action at least as long as 1½ years before the commencement of the trial. In arguing motions for summary judgment the grounds of alleged illegality of the franchise and lease were set forth. [Tr. 113-114.] Likewise at the opening of the trial, counsel for respondent in his opening statement presented the same issue. [Tr. 119-120.] It is therefore obvious that no "actual" prejudice could possibly have resulted to petitioners if the complaint did not clearly raise the issue of illegality (which we think it did).

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3. California Law Allowed Owner of Theatre Its Possession if Lease-Franchise Were Illegal. Enforcement of Rights Arising Out of Illegal Contract Was Not Involved.

It is asserted by petitioners that the District Court violated "the rule against aiding wrongdoers" in entertaining the suit of respondents for restitution of its property and a declaration of its rights on the theory that the contract between petitioners and respondents was unlawful. (Pet. Br. 20-21.) Petitioners cite, in support of their contention, *Warner Bros. v. Cooper Foundation,* 189 F. 2d 825 (10th Cir. 1951), and *Fabacher v. Bryant,* 46 La. Ann. 820. Neither of these cases is controlling.

In *Warner Bros. v. Cooper Foundation,* Warner Bros. sought to impose a constructive trust upon a ten-year lease of a theatre. Warners had no interest in this lease except such as might arise out of a pooling agreement upon the existence of which the alleged fiduciary duty was wholly dependent. The Court merely held it would not enforce an alleged right which existed solely by virtue of an illegal contract. Thus, when the Court said that the right sought to be enforced grew out of an illegal contract, it meant that it was a right which depended upon such illegal contract being given force.

Fabacher v. Bryant is in the same category as the *Warner Bros.* case. The Court merely refused to entertain a claim for damages for breach of a contract forced upon the defendant by unlawful union activities.

These holdings, of course, have no relation to the case at bar. Respondents owned the theatre, possession of which petitioners were withholding, and aside from the existence of the lease and franchise agreement, the legality of which was questioned, petitioners were trespassers

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in possssion without right. Respondents' claimed right to possession arises out of its ownership and does not "grow out of" the lease and franchise agreement. The only effect of the illegality of the lease and franchise agreement is to make it ineffective to entitle petitioners to withhold possession from respondents.

Under these circumstances the Trial Court's view [Tr. 142] that respondent Paramount Pictures Theatres Corporation, as owner of the property, was entitled to possession if the lease under which Partmar held possession was illegal and void, was entirely correct.

The California law, which is controlling as to the right to possession of property in an action brought in the Federal District Court on the ground of diversity of citizenship, is correctly set forth in the decision in *Glos v. McBride,* 47 Cal. App. 688, 191 Pac. 67 (1920). A lease of real property was based upon an illegal consideration, and the lease was held illegal *in toto.* Nonetheless, the landlord was held to have the right to repudiate and abandon the lease and to recover possession of the property and have redress for the unexpired term. The Court pointed out the difference between an illegal contract, which is fully executed, and one which is unexecuted or which has some period yet to run. The Court said (p. 690, 191 Pac. at p. 67):

> "While, as to executed contracts of such nature this is a rule of almost universal application, it is equally true that as to like [illegal] contracts, which are unexecuted, the law recognizes what is termed *a locus penitentiae* accorded to a plaintiff, which, as applied to the facts here presented, is an opportunity to repudiate the agreement and refuse to be a party to the acts contemplated thereby."

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The lessor was thus permitted to recover possession o her real property by proving that the lease, pursuant t which it was occupied by the defendant, was unlawfu the Court saying (pp. 690-691, 191 Pac. at p. 68):

> "Conceding, however, that she [plaintiff] did en ter upon the life with defendant, as contemplated i the agreement, we do not think it can be said he day of repentance was past. The contract contem plated a continuing immoral relation, which, in ou opinion, even though entered upon, plaintiff in th *locus penitentiae* accorded to her, might at any tim repudiate and discontinue; and while the law woul afford her no relief for the use of the leasehold es tate covering the expired portion thereof it should *as to the unexpired term* thereof, and upon a showin of repentance, abandonment and discontinuance o the shameful relation, grant her redress. In ou opinion the court erred in sustaining the demurrer.'

To a like effect is *Green v. Frahm,* 176 Cal. 259, 16 Pac. 114 (1917), in which the Court said (p. 263, 16 Pac. at p. 116):

> "In the first place, the plaintiff is not suing on an contract embodied in the lease. His right of actio arises from the termination of the lease, whereb the purpose for which his money was deposited wa defeated and he has become entitled to its return . . . The asserted illegality was in the lease, no in the rights growing out of its premature termina tion by the judgment. The doctrine that one canno recover upon a contract that is against public policy does not apply."

See also, *McKinney v. Andrews,* 41 Tex. Rep. 36 (1874), and *Hall v. Corcoran,* 107 Mass. 251, 256-7 (1871).

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It was thus entirely proper for the Court to consider the question whether the lease and franchise agreement was illegal in determining whether respondent should be given restitution of possession of the property and a declaration that the lease was terminated.

It is apparent, moreover, that this review is not an appropriate one in which to raise the propriety of the District Court's action considering the legality of the lease and franchise agreement. The rule of law relied upon by petitioners, besides being inapplicable, does not affect the jurisdiction of the Court and a violation thereof would at most be error. This proceeding, by the order of this Honorable Court, has been restricted to the question of the propriety of the dismissal of the Counterclaims and any attack upon the judgment on the First, Second and Fifth Causes of Action is therefore a collateral attack It is obvious, therefore, that mere matters of alleged error cannot be raised.

This is all the more true since petitioners are enjoying the benefits of the judgment on the First, Second and Fifth Causes of Action. Such being the case, it is immaterial whether such judgment is erroneous in this respect or not.

In *Davis v. Wakeley,* 156 U. S. 680, *supra,* it was admitted by the parties and held by the Court that the judgment in the prior action was based upon an erroneous legal position. Still the estoppel to deny its effect was imposed.

This is made more apparent by the decision in *Davis v. Cornwall,* 68 Fed. 522, *supra,* in which it is pointed out that, despite the fact that both the parties to the prior litigation are presumed in law to know that the

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disposition there made was erroneous, a party who successfully urges a view upon the Court cannot gainsay the effect of the judgment he has procured.

Even more emphatic is the decision in *Officer v. J. L. Owens Co.*, 252 Fed. 337, *supra*, in which the prior action erroneously included the amount of certain notes as an element of damages, and the plaintiff therein, defendant in the subsequent action, was held precluded from asserting the lack of consideration for the notes. In this case the Court said (p. 343):

> "If there was error in those respects in the trial of No. 338, counsel could have corrected them in that case, *but it cannot do so in this.*"

4. District Court Did Not Determine Merely That Lease and Franchise Were Legal "Standing Alone"; but Expressly Found There Was No Connection Between Them and Any Conspiracy.

Petitioners assert, over and over again (*e.g.*, Pet. Br. 11, 12, 15, 24, 26 *et seq.*), that the District Court merely adjudicated that the lease and franchise agreement were "not, *standing alone*, violative of the antitrust laws." They argue that such limited adjudication is not controlling as to "the issue of legality of the same acts and contracts in the context of conspiracy contrary to the antitrust laws." (Pet. Br. 26-31.)

The keystone of petitioners' argument seems to be that the Trial Court considered and determined the validity of the lease-franchise agreement "standing alone" and without considering its connection with any conspiracy to restrain trade. We have counted not less than 10 separate statements of the phrase "standing alone" in this

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connection in petitioners' brief. The premise is completely false. Mere repetition of a false premise does not enhance its stature.

This argument that the legality of the lease-franchise agreement was considered "standing alone" and apart from any conspiracy, is put up by counsel for petitioners in several different ways. Answering any one of them answers them all. For example, petitioners assert (Pet. Br. 11) that:

> "The briefs [in the Trial Court] on *both sides* considered only the question whether the franchise was a contract in unlawful restraint of trade, as a single contract, *standing alone* and apart from the conspiracy in the government case."

But Petitioners' Brief in the Trial Court stated exactly the contrary [Tr. 65] as follows:

> "On the evidence in this case, the Partmar franchise is neither one of a system, or made by one holding a dominant position, or *pursuant to a conspiracy.*"

Again, petitioners now assert (Pet. Br. 12) that the Trial Court's opinion:

> "shows that the question of the legality of the franchise *standing alone,* was considered, decided, and was decisive of the case."

And

> "The Court next considered the question whether the franchise was violative of the antitrust laws *standing alone and apart from the conspiracy.*" (Pet. Br. 12.)

But the Opinion of the Trial Court clearly and unequivocally shows the fallacy of that argument. The Trial Court's Opinion refers to the question of the legality of the lease-franchise agreement *generally* and without any

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limitation as to any single ground of claimed illegality. Petitioners' counsel simply interpolates into the Trial Court's Opinion the words "standing alone" when they are not found anywhere in the Opinion itself. The Trial Court said specifically in its Opinion [Tr. 77]:

> "Hence, we now proceed to the question of the legality of the franchise agreement."

There is no limitation in that language of the Trial Court. Moreover, the Opinion of the Trial Court, after reviewing the industry practices on runs and clearances and the like, said [Tr. 82]:

> "Paramount, *not in conjunction with any other major studio,* entered into the franchise agreement which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles."

The Opinion of the Trial Court further states [Tr. 88]:

> "In the case at bar, there is no proof of conspiracy."

and then proceeds to elaborate on this point [Tr. 89].

Not only was the issue of whether the lease and franchise agreement were part of a conspiracy litigated during the trial of the First, Second and Fifth Causes of Action (as pointed out, *supra,* Chapter II, A). Not only did counsel for petitioner in their closing brief in the Trial Court specifically urge upon the Trial Court that the Partmar franchise was not made pursuant to any conspiracy. [Tr. 65.] But the Trial Court expressly found that the lease and franchise were not a part or the result of any conspiracy whatsoever. The Court found:

> "20. Paramount, not in conjunction with any other major studio, entered into the franchise agree-

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ment which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons." [Tr. 103.]

In the face of this finding, it is absurd for petitioners to contend that the Court found *only* that the lease and franchise agreement were legal "standing alone." The keystone of petitioners' brief is based on this demonstrably false premise.

B. FINDING OF FACT MADE IN TRIAL OF FIRST, SECOND AND FIFTH CAUSES OF ACTION IS CONCLUSIVE AGAINST PETITIONERS ON COUNTERCLAIMS.

The issue of connection between any conspiracy and the lease and franchise agreement which was determined in the trial of the First, Second and Fifth Causes of Action is, as hereinbefore demonstrated, the same issue as that raised by the First, Second and Fourth Counterclaims. Such being the case, the determination of this issue made in the trial of the First, Second and Fifth Causes of Action is conclusive against petitioners with respect to their Counterclaims. The fact that the Counterclaims are different causes of action does not mitigate against this conclusiveness, nor does the fact that there are additional parties defendant in the Counterclaims who were not parties to the First, Second and Fifth Causes of Action.

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1. A Judgment Is Conclusive as to All Facts Put in Issue and Actually Adjudicated Therein Whether the Subsequent Proceedings Are on the Same or a Different Cause of Action.

The rule is well settled that parties to a litigation cannot relitigate issues therein determined, either by reasserting the same cause of action or by challenging the determination in the trial of another cause of action. This principle is aptly stated in 50 C. J. S. 168-173, as follows:

> "A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies even though, according to the decisions on the question, the subsequent proceedings are on a different cause of action, since the law ahbors a multiplicity of suits."

This Honorable Court has announced the same rule in its decision in *Southern Pacific Raiload v. United States,* 168 U. S. 1, 48-49 (1897), where the Court said:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been

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established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

This aspect of the doctrine of *res judicata* is explained by the Supreme Court of California in *Zaragosa v. Craven*, 33 Cal. 2d 315, 321, 202 P. 2d 73, 77 (1949):

> "The doctrine of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or cause of action, it operates as an estoppel or a conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action."

2. THE CONCLUSIVENESS OF A FINDING IS NOT AFFECTED BY ADDITIONAL PARTIES NAMED AS COUNTER-DEFENDANTS.

The petitioners and third party plaintiffs, Partmar Corporation and Fanchon & Marco, Inc., are both parties to the First, Second and Fifth Causes of Action. As pointed out (Pet. 8) the Counterclaims named as third party defendants, Paramount Pictures, Inc., and several of its principal officials, in addition to Paramount Pictures Theatres Corporation, the plaintiff in the original complaint herein. The addition of these parties, none of whom were formally named as parties to the First, Second and Fifth Causes of Action, does not affect the con-

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clusiveness of the finding of fact made in the trial thereof with respect to the Counterclaims, when urged as a *defense* against petitioners who were parties thereto.

a. *Mutuality Is Not Required Where Res Judicata Is Urged as a Defense, if the Party Against Whom the Defense Is Urged Was a Party to the Prior Proceeding.*

Petitioners object that there is no "mutuality of estoppel" of the adjudication that the lease and franchise agreement were not part of any conspiracy. (Pet. 22-23.)

The growing view of the well considered recent decisions involving the question of "mutuality" in *res judicata* is that where *res judicata* is urged as a defense, mutuality is not required if the party against whom the defense is urged was a party to a prior proceeding. That is the precise point before this Court in this review. Petitioners were parties at the trial of the First, Second and Fifth Causes of Action and to the Judgment rendered thereon, including Finding 20. The *res judicata* arising out of Finding 20 is a complete defense to petitioners' Counterclaims.

All that is necessary to hold to sustain the conclusiveness of the finding in this case is that *res judicata* may be urged *as a defense* against anyone who was a party to a prior proceeding regardless of whether the person in whose behalf such defense is raised was a party thereto. No question of due process is involved in such holding since the person against whom the defense is effective has had his day in court on the issue in question. The objection therefore to the application of the doctrine of *res judicata* which was involved in *Robertson v. Gordon*, 226 U. S. 311 (1912), cited by petitioners, is not involved.

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It is not necessary for the purpose of this case to extend the doctrine so as to permit *res judicata* to be used as the basis for a claim by one not a party to prior litigation since it is only used in this action as a defense to petitioners' claim. The application of the doctrine of *res judicata* under these circumstances is supported by many well-reasoned authorities and advocated by most commentators on the subject.

Bruszewski v. United States, 181 F. 2d 419 (3rd Cir., 1950), cert. den. 340 U. S. 865 (1950). The United States was permitted to urge the defense of *res judicata* against a plaintiff who sued for personal injury suffered while working on a ship owned by the United States. The United States was not a party to the prior action in which plaintiff had sued a steamship company which was operating the ship under a "general agency service agreement." Lack of mutuality of the estoppel was urged by the plaintiff. Judge Hastie overruled this objection, saying:

> "The countervailing consideration urged here is lack of mutuality of estoppel. In the present suit Bruszewski would not have been permitted to take advantage of an earlier affirmative finding of negligence, had such finding been made in the Isthmian case. For that reason he argues that he should not be bound by a contrary finding in that case. But a finding of negligence in the Isthmian case would not have been binding against the United States because the United States had no opportunity to contest the issue there. The finding of no negligence on the other hand was made after full opportunity to Bruszewski on his own election to prove the very matter which he now urges a second time. Thus, no unfairness results here from estoppel which is

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not mutual. *In reality the argument of appellant is merely that the application of res judicata in this case makes the law asymmetrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of res judicata.*" (P. 421.)

". . . In all, we are satisfied that the present application of *res judicata* is both sound in principle and in accord with a substantial body of well-reasoned decisions." (P. 422.)

The same conclusion was reached by the Supreme Court of California in *Bernhard v. Bank of America,* 19 Cal. 2d 807, 122 P. 2d 892 (1942). In this case an estate was held precluded by *res judicata* from claiming the amount of a bank deposit in its suit against the bank. In a former action between the estate and another party it had been determined that the amount of the deposit had been the subject of a gift to a third person. The fact that the bank who raised the bar of the former judgment was not a party to this prior proceeding was held not to preclude its reliance upon the doctrine of *res judicata* as a defense. The issue as to the fact that the funds had been the subject of a gift was held to be precluded against the estate. In this connection the Court said (p. 811, 122 P. 2d at p. 894):

"The criteria for determining *who may assert* a plea of *res judicata* differ fundamentally from the criteria for determining *against whom* a plea of *res judicata* may be asserted. The requirements of due process of law forbid the assertion of a plea of *res judicata* against a party unless he was bound by the earlier litigation in which the matter was decided (*Coca Cola Co. v. Pepsi Cola Co., supra.* See cases

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cited in 24 Am. &. Eng. Encyc. (2d ed.) 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872.) He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. (*Ibid.*) There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation.

Perhaps the most discussed case, dispensing with the requirement of mutuality where *res judicata* is used as a defense, is *Coca-Cola Co. v. Pepsi-Cola Co.*, 36 Del. 124, 172 Atl. 260 (1934). Again the defendant was held entitled to urge *res judicata* though he was not a party to the prior proceeding. The court points out the lack of any sound basis for the requirement of mutuality under these circumstances saying:

". . . In 24 A. and E. Encl. (2d Ed.) 731, is given the only concrete basis for the rule that we have found. There it is said

" 'The rule that a judgment or decree concludes only parties or privies is based on that fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the United States has been embodied in the Federal Constitution and in the Constitution of the several States.'

"In a great majority of cases this given reason may be satisfactory, but it is immediately apparent that it cannot always be so for it is obvious that it can have application only when the doctrine is invoked against one who had not been a party to the former proceeding. This reason fails when applied to one who had been a party to the former proceed-

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ings, for he has not been deprived of any due process in the presentation of his rights or claims.

"The doctrine of res judicata is primarily one of public policy and only secondarily of private benefit to individual litigants. It draws its strength not so much from the private advantage of the party seeking to invoke it, but its roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammelled opportunity of presenting all of the facts pertinent to the controversy." (p. 262.)

". . . The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to reopen and re-try all the old issues each time he can obtain a new adversary not in privity with his former one." (P. 263.)

Other authorities likewise disapproving the requirement of mutuality under these circumstances are:

Slater v. Slater, 372 Pa. 519, 94 A. 2d 750 (1953);

Cohen v. Superior Oil Corporation, 16 F. Supp. 221 (D. C. Del., 1936), affirmed, 90 F. 2d 810, cert. den. 302 U. S. 726;

Cohen v. Dana, 83 N. Y. S. 2d 414 (Sup. Ct. 1948).

An able exposition of this subject is contained in 65 Harv. Law Rev. 818, 862-865, where the author clearly spells out the scope and limitations of the requirement of mutuality. When, as in this case, *res judicata* is used as a shield and not as a sword, mutuality is not required.

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The doctrine of *res judicata* is not an inequitable technicality, but rather a sound rule of public policy which should be applied wherever appropriate. In this respect this Honorable Court said in *Hart Steel Company, et al. v. Railroad Supply Company,* 244 U. S. 294 (1917) (p. 299):

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever a judgment is entitled to respect."

(b) *The Res Judicata as to Mutually Estopped Counter-defendants Exonerates Other Counter-defendants.*

The only additional parties to the Counterclaims who were not parties to the First, Second and Fifth Causes of Action are the principal officials of Paramount Pictures, Inc., who were named and served. Paramount Pictures, Inc., though not formally named as a party to the First, Second and Fifth Causes of Action, clearly is bound by the judgment thereon. Not only was the plaintiff, Paramount Pictures Theatres Corporation, a wholly-owned subsidiary of Paramount Pictures, Inc., but the trial of the First, Second and Fifth Causes of Action was conducted by counsel representing both Paramount Pictures Theatres Corporation and Paramount Pictures, Inc. The obvious identity of Paramount Pictures Theatres Corporation and Paramount Pictures, Inc., as parties in this action was commented upon by the court in the Memo-

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randum of Opinion [Tr. 71], and was the subject of a conclusion of law to the effect that:

> "For the purpose of clarity of the transaction which is the subject of this action, plaintiff and Paramount Pictures, Inc., should be considered as 'Paramount.'" [Tr. 106.]

In accordance with this conclusion, the Court, throughout the findings, conclusion and judgment treated both Paramount Pictures Theatres Corporation and Paramount Pictures, Inc., as one party. This was consistent with his view that the lease and franchise should be considered as a single and inseverable agreement. [Tr. 74.] Petitioners made no objection to the Court treating Paramount Pictures Theatres Corporation and Paramount Pictures, Inc., as one party and, further, made no objection to its rendering a judgment that the franchise was "a valid subsisting agreement in full force and effect," upon Paramount Pictures, Inc. [Tr. 110.] In fact, petitioners still assert that there is "no factual distinction between" these respondents. (Pet. Br. 23, Fn. 1.)

The judgment, therefore, was in fact a judgment against Paramount Pictures, Inc., in so far as it adjudged the franchise agreement to be a valid and subsisting agreement in full force and effect, both because of the identity of or the privity between Paramount Pictures, Inc., as parent, and Paramount Pictures Theatres Corporation as wholly-owned subsidiary, *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294 (1917), and because of the active participation of Paramount Pictures, Inc., in the trial, *Ocean Accident & Guaranty Corp. v. Felgemaker*, 143 F. 2d 950 (6th Cir., 1944). Under these circumstances it is apparent that as to third party defendant and respondent, Paramount Pictures, Inc., there is mutuality.

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It is thus only as to the counter-defendants, who are the "principal officials" of Paramount Pictures, Inc., that there is any question of mutuality. As to these counter-defendants, the *res judicata* as to the two corporate defendants is effective to preclude recovery. The only conspiratorial acts alleged to have damaged petitioner Partmar in the First, Second and Fourth Counterclaims are the imposition of excessive terms in the lease and franchise agreement. These acts are acts of the corporate defendants, and if the other defendants, who are principal officers of the corporate defendants, participated in these conspiratorial acts, it is manifest that they did so in their capacity of officials of such corporations. It is an obvious, logical impossibility that the alleged conspiratorial act of the corporation could itself not be connected with any conspiracy while the acts of the officials who, in this respect could act only through the corporation, were part of such conspiracy. The culpability, therefore, of the individual counter-defendants, who are officials of respondents, can exist only if the act of the corporation through which alone they could have acted was culpable. It is *res judicata* that the acts of the corporate defendants were not culpable.

Where a party can only be culpable on the assumption that another party is culpable, but the lack of such culpability of such other party is *res judicata*, the requirement of mutuality is never applicable.

Portland Gold Mining Co. v. Stratton's Independents, 158 Fed. 63 (8th Cir., 1907). The lessor was held entitled to the benefit of a judgment in favor of his lessee that he had not trespassed upon the adjoining property in his mining operations. The court stated the applicable principle as follows (pp. 68-69):

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> ". . . If the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way."

This Honorable Court approved the decision in *Portland Gold Mining Co. v. Stratton's Independents, supra,* in *Bigelow v. Old Dominion Copper Co.,* 225 U. S. 111, 127-128 (1912), where it was said:

> "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the same plaintiff. See *Portland Gold Mining Co. v. Stratton's Independents,* 158 Fed. 63, where the cases are collected."

Thus, even though a requirement of mutuality should be held applicable under ordinary circumstances (and the respondents have demonstrated that it should not), the finding of lack of connection between any conspiracy and the lease and franchise agreement in the First, Second and Fifth Causes of Action would be conclusive against petitioners on their Counterclaims as to all respondents. Of course, even if the finding is not held conclusive as to the other third party defendants for lack of mutuality, the judgment must be affirmed as to Respondent Paramount. (1 Freeman on Judgments 907, Fifth Ed., 1925.)

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IV.

SINCE NO GENUINE ISSUE AS TO A MATERIAL FACT REMAINED, DISMISSAL OF COUNTERCLAIMS WAS PROPER.

As hereinbefore demonstrated, petitioners are precluded and estopped to prove a fact material to recovery upon their Counterclaims, and said issue of fact is *res judicata* against them. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure was therefore appropriate.

Petitioners were afforded the equivalent of a hearing upon such a motion, though no formal motion was made by respondents. The dismissal of the Counterclaims was not, as contended by petitioners (Pet. Br. 18),

> "without any previous notice to or knowledge of petitioners, without any hearing of any kind granted to petitioners, without affording petitioners at any time any opportunity whatever to present evidence in support of the claims, without requiring any evidence in rebuttal of the claims, and without the disclosure of any reason for dismissal by the District Court except the brief statement that 'we find no substantial evidence of a conspiracy in this case.' "

Petitioners were amply warned during the course of the trial that it was the Court's view that a determination in the petitioners' favor in the unlawful detainer cause of action or the declaratory relief cause of action would necessarily result in the dismissal of their Counterclaims. [Tr. 142.] Upon rendition of the Court's Opinion that the unlawful detainer and declaratory relief actions should be disposed of in petitioners' favor and that the Counterclaims should be dismissed [Tr. 94], petitioners submitted their proposed findings, conclusions and judgment

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which did not carry out this portion of the Court's decision. Respondents thereupon submitted findings, conclusions and a judgment embodying this decision. Thus, in effect, respondents requested the Court to bar the Counterclaims on the basis of the former judgment, findings, and conduct of the trial by petitioners, while petitioners on the other hand requested the Court not to dismiss the Counterclaims on this ground. It is not correct, therefore, for petitioners to assert (Pet. Br. 22) that respondents did not request the Court to apply preclusion and estoppel and *res judicata* in the dismissal of the Counterclaims.

The matter of settling the findings, conclusions and judgment was set for hearing on June 18, 1951. Petitioners were duly advised by the Opinion of the Court and by the submission of respondents' proposed findings of fact, conclusions and judgment [Tr. 104, 107-108], *that the issue of summary disposition of their Counterclaims was before the Court.* Petitioners appeared and opposed such summary disposition of their Counterclaims, on the ground, among others, that the issue in the First, Second and Fifth Causes of Action was not the same as that involved in the Counterclaims. [Tr. 143-147.] This is essentially the same contention they are making before this Honorable Court. There was no occasion for the introduction of any new evidence in relation to this contention. The hearing to settle the findings of fact, conclusions and judgment was as appropriate for the determination of this issue as any other hearing would have been. Petitioners had a hearing with respect to the question of whether there was a genuine issue as to the material fact of the alleged connection between the conspiracy set forth in the Counterclaims and the terms, conditions

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and charges imposed in the lease and franchise agreement. The hearing they had was the kind of a hearing that is universally accorded where such is the type of question under consideration. No sound reason is suggested by petitioners why, under these conditions, they should have had any other kind of a hearing, and it is manifest that logically no other type of hearing was called for. *The judgment dismissing the Counterclaims was in effect a summary judgment.* It was rendered in a situation in which summary judgment was appropriate.

A formal motion for summary judgment is not necessary to the validity of an order summarily dismissing claims with respect to which there is no genuine issue as to a material fact. The purpose of the summary judgment procedure is to expedite the disposition of cases when there is no genuine issue as to a material fact. This purpose is no less served when such circumstances appear to the court without a formal motion than where there is such a motion. Consequently, it is proper to award summary judgment to a party though such party has not moved the court for summary judgment.

Northland Greyhound Lines, Inc. v. Amalgamated Ass'n, etc., 66 F. Supp. 431 (D. C. Minn., 1946). A summary judgment for defendant was entered where plaintiff had filed a motion for summary judgment, but no cross-motion by defendant had been made. The court said (p. 433):

> "Although the parties draw different conclusions from certain facts, there is no controversion of any material fact and therefore no genuine issue for trial. Summary judgment is proper in such a case. Although Rule 56(c) provides in part 'the judgment sought shall be rendered forthwith if the pleadings,

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> depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,' and *defendants here have filed no cross-motion,* it seems to me that where the case is properly disposable by summary judgment the court should enter whatever judgment is proper in the circumstances. . . . While it may be the better practice to file a cross-motion *I do not think that Rule 56(c) proscribes the court's power to enter judgment because of the mechanical failure of one of the parties to file a motion.*"

To like effect is *Hooker v. New York Life Ins. Co.,* 66 F. Supp. 313 (N. D. Ill., 1946), reversed on other grounds, 161 F. 2d 852. In this case defendant moved for a summary judgment and the case was disposed of by the granting of a summary judgment to plaintiff, who had not filed a cross-motion. In this respect the court said (p. 318):

> "There remains the question of the proper disposition of the case, since the plaintiff has not made a cross-motion for summary judgment. If the plaintiff had made such a motion, and if the defendant had admitted the facts which it so strongly urges, by way of affidavits, in favor of its motion, it would be clear that the plaintiff would be entitled to summary judgment. Since the purpose of the summary judgment procedure under Rule 56 is to expedite the disposition of actions in which there is no genuine issue of fact requiring trial, it would seem that the court can properly enter a summary judgment in favor of the party entitled to it."

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V.

JUDGMENT OF DISTRICT COURT AND COURT OF APPEALS MAY NOT BE REVERSED EXCEPT FOR ERRORS OR DEFECTS WHICH AFFECT THE SUBSTANTIAL RIGHTS OF THE PARTIES.

Petitioners could not in any event recover on their Counterclaims, since they are precluded and estopped from proving a fact essential to such recovery, and such issue of fact is *res judicata* against them. No error or defect in the procedure by which the Counterclaims were dismissed could, therefore, affect the substantial rights of petitioners.[7]

Errors or defects which do not affect the substantial rights of the parties are not grounds for reversal of the judgment of the courts below.

Title 28, U. S. C. A., Section 2111:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not effect the substantial rights of the parties."

Technical errors against litigants who cannot successfully prosecute or defend their case in any event do not constitute prejudicial error or affect the substantial rights of such litigants.

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[7]Respondents believe, of course, as shown in Chapter IV of this brief, that the procedure which was followed afforded appellants the substance of the kind of hearing to which they were entitled.

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Horning v. District of Columbia, 254 U. S. 135 (1920). The judge in the criminal prosecution for violation of a District of Columbia pawn broker's license regulation instructed the jury that the undisputed facts clearly established the offense charged. It was not permissible for the judge to direct a verdict. However, the instructions given were held not to constitute prejudicial error. The court said (pp. 138-139):

> ". . . Perhaps there was a regrettable peremptoriness of tone—but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt."

Forster v. Insurance Co. of North America, 139 F. 2d 875, 876-877 (2nd Cir., 1944):

> "Even if the denial of a jury trial was wrong it was harmless error for there was no issue of fact to submit to a jury."

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VI.

NO QUESTION OF NULLIFICATION OF THE DECISION IN UNITED STATES V. PARAMOUNT PICTURES, INC., IS INVOLVED.

Petitioners assert (Pet. Br. 31) that the decisions below have approved runs and clearances disapproved as unlawful restraints of trade by the decision in *United States v. Paramount Pictures, Inc.* They do not explain the significance of this assertion in their brief. In the petition, however, their argument is more expanded and indicates that the significance which they place upon this assertion is the "nullification of the benefit and authority of the *Paramount* case in the Ninth Circuit [which] will make it impossible for any motion picture exhibitor injured by reason of the conspiracy and restraint in that case, to prevail in any suit for damages or injunction." (Pet. 28.)

The order granting certiorari specifically limited the review to the "issue of dismissal of counterclaims." Any question as to runs and clearances in the Los Angeles area was thereby eliminated from the scope of this review. The order restricting this review is perfectly correct, since we have demonstrated that the findings and adjudication in the Trial Court on the various issues, including clearance and run were expressly urged upon the Trial Court by petitioners themselves and they are now precluded and estopped from taking a directly opposite position by way of collateral attack upon such findings and adjudication brought on by themselves. In view of the order limiting the scope of this review, Respondents do not understand why petitioners persist in their argument concerning runs and clearances.

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In the light of such limitations, Respondents believe that they should not argue this question at length. However, Respondents wish to point out three main factors in this connection:

1. There never has been a final judgment in the New York suit of *United States v. Paramount Pictures, Inc.*, as to respondent Paramount, in which it has been determined that there was a conspiracy effective with respect to run and clearance in the Los Angeles area. Much less has there ever been any final judgment against respondent Paramount in the New York case that there was any such conspiracy effective as to the first-run exhibition of Paramount pictures in the Los Angeles area.

(a) It is elementary that Section 5 of the Clayton Act makes a judgment in a prior government case admissible in a private treble damage action only if the prior judgment was final as to the party against whom it is offered in the private suit, and only as to matters there determined in respect of which it would be an estoppel as between the parties thereto.

(b) It is also elementary that under Section 5 of the Clayton Act it is *prima facie* evidence only in respect of matters as to which said "judgment or decree would be an estoppel as between the parties thereto." This means that only those matters which were "distinctly put in issue and directly determined" in the government action are *prima facie* evidence in a subsequent private suit (*Emich Motors v. General Motors Corporation,* 340 U. S. 558, 569 (1951)). As shown in the next subparagraph, the Expediting Court expressly left open these questions for local suits and therefore did not "directly determine" such issue.

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(c) The three-judge expediting court in the New York case specifically reserved these questions for local courts (66 F. Supp. 323, 342):

> "The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an arbitration board composed of men versed in the complexities of this industry."

(d) The 1946 decree in the New York case (66 F. Supp. 323, 70 F. Supp. 53) was appealed to this Court which remanded the case for further trial.[8] Before such retrial, respondent Paramount entered into a consent decree in March 1949 [Tr. 312] and an order was made in the New York case terminating and severing the proceeding as to respondent Paramount. Thereafter, the case proceeded to trial as against the defendants who had not entered into consent decrees and findings of fact, conclusions of law and a decree were entered against them in 1950. At that time the judgment became final as against the defendants who had not been severed out of the case. The final decree as to Paramount was the 1949 consent decree which contains no findings on the subject contended for by petitioners. The Paramount consent decree did not adjudicate that the defendants therein had "violated" the antitrust law, as expressly required by Section 5 of the Clayton Act in order to render the prior judgment admissible as *prima facie* evidence.

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[8]That this 1946 decree, even after appeal and remand from this Court, was not admissible in a private treble damage suit, see *Fifth and Walnut v. Loew's, Inc.* (2d Cir. 1949), 176 F. 2d 587, 594; *Duluth Theatre Corporation v. Paramount Pictures* (D. C. Minn. 1947), 72 F. Supp. 625.

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2. Petitioners, though making a great to-do over the New York decree and Section 5 of the Clayton Act actually failed to offer any of the several decrees in the New York case into evidence before the Trial Court in this case.

(a) Petitioners are wrong in asserting they were prevented by ruling of the Trial Court from having the decrees in the New York case received into evidence as they argue in their brief (p. 17).

(b) The Trial Court stated that petitioner's counsel could offer the New York decrees into evidence when his time came [Tr. 131], that is, when petitioners put on their defense case in chief during the trial of the First, Second and Fifth Causes of Action. But counsel for petioners never offered the New York decree. (See *supra*, p. 30.)

(c) The Trial Court stated that he would read the Opinion in the New York case and the Opinion of the Supreme Court appealed therefrom, since he was bound thereby whether it was received into evidence or not. [Tr. 130.]

3. Finding 20 and the adjudication of the Trial Court is not, as contended by petitioners (Pet. Br. 31) a finding that the alleged conspiracy, which was the subject of the New York decree in *United States v. Paramount*, did not exist. Finding 20 and the adjudication of the Trial Court herein is simply a determination that the particular lease and franchise between petitioner Partmar and Respondent Paramount are not a part of or the result of this or any other conspiracy. Therefore, there is no nullification of or any inconsistency between the Trial Court's finding and determination on the one hand and the New York decree on the other hand.

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CONCLUSION.

It is respectfully urged that the issue of the lease and franchise being part of a conspiracy was placed in issue in the trial below. Petitioners urged the lack of any conspiracy connected with the lease and franchise. The Court accepted their contention and found that the lease and franchise were valid and subsisting and were no part of any conspiracy. Part III of the Judgment declaring the lease and franchise to be valid and subsisting agreements in all respects was based in essential part upon such finding and determination so urged upon the Trial Court by petitioners. Petitioners did not appeal from Part III of the Judgment which was very favorable to them. Instead, they have accepted the benefits of having first-run exhibition of all Paramount pictures licensed under the franchise during the balance of the term of that agreement, enjoying that benefit over all other exhibitors in the Los Angeles area, and also enjoying the clearance over all theatres in the Los Angeles area on these Paramount pictures, as well as the other benefits from the franchise and the lease. Having done all this, the law simply precludes and estops petitioners from asserting in any subsequent trial over the validity of the lease and franchise that they were a part of any conspiracy. That being so, dismissal of the Counterclaims was perfectly proper. The Judgment of the Trial Court was correct, the affirmance by the Court of Appeals was likewise correct and requires an affirmance by this Court.

Respectfully submitted,

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